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UNIQLO (MALAYSIA) SDN BHD v. KETUA PENGARAH KASTAM DAN EKSAIS

COURT OF APPEAL, PUTRAJAYA
BADARIAH SAHAMID JCA
HARMINDAR SINGH DHALIWAL JCA
B NOR BEE ARIFFIN JCA
[CIVIL APPEAL NO: W-01(A)-423-11-2017]
9 JULY 2020

C ***ADMINISTRATIVE LAW:*** *Judicial review – Certiorari – Application to quash decision of Director General of Customs and Excise ('DG') in rejecting applicant's application for special refund of sales tax for goods held on hand – Whether applicant fulfilled all requirements of ss. 190(1) & 191(2)(b) of Goods and Services Tax Act 2014 – Whether DG had legal duty to give reasons for its decision to reject applicant's special refund application – Rules of Court 2012, O. 53 r. 3(1)*

D ***REVENUE LAW:*** *Goods and services tax – Special refund of sales tax for goods – Application for – Director General of Customs and Excise ('DG') rejected applicant's application for special refund of sales tax for goods held on hand – Whether applicant fulfilled all requirements of ss. 190(1) & 191(2)(b) of Goods and Services Tax Act 2014 – Whether DG had legal duty to give reasons for its decision to reject applicant's*
E *special refund application*

The applicant, a company in the retail business, retailed its goods through several outlets in various locations within Malaysia. Pursuant to the introduction of the Goods and Services Tax ('GST') regime, the applicant
F was registered under s. 20 of the Goods and Services Tax Act 2014 ('GST Act') effective from 1 April 2015. Subsequently, on 26 August 2015, the applicant submitted an application to the respondent for a special refund of sales tax for goods held on hand by the applicant pursuant to s. 191 of the GST Act ('special refund application'). The respondent requested from the applicant relevant supporting documents to be submitted for the purposes of
G a sales tax audit to be conducted by the respondent. The respondent's requests were duly complied with by the applicant. *Vide* a letter dated 16 November 2016, the respondent issued a letter to the applicant informing the applicant of the decision that the applicant's special refund application had been rejected. In response, the applicant wrote to the respondent
H requesting for clarification and/or reasons for the rejection. Aggrieved by the respondent's decision and absence of response to the applicant's request for clarification and/or reasons for rejection, the applicant filed a judicial review application pursuant to O. 53 r. 3(1) of the Rules of Court 2012 ('ROC 2012') and sought the following orders (i) an order of *certiorari* to quash the
I respondent's decision that the applicant's application for special refund of

sales tax for goods held on hand pursuant to s. 190 of the GST Act was rejected without any justification or reasoning; and (ii) an order of *mandamus* directing that the respondent refund the sum of RM6,076,369.33 for the special refund of sales tax for goods held on hand to be paid to the applicant by the respondent upon final determination of this judicial review. The applicant submitted, *inter alia*, that it had fulfilled all the requirements of ss. 190(1) and 191(2)(b) of the GST Act to be granted the special refund. The respondent, however, submitted that on completion of the physical verification audits, the respondent made the finding that the goods held in the applicant's system did not correspond with the goods physically held by the applicant and that the applicant was unable to prove that the sales tax element had been removed from the sales price before applying for special refund from the respondent. The High Court Judge ('HCJ'), in dismissing the applicant's judicial review application, found that the applicant was caught by s. 191(3) of the GST Act which provides that the applicant shall not be entitled to a special refund and the respondent may reject such a claim for refund where any information on the claim was found to be inaccurate or misleading. The HCJ also held that s. 191 of the GST Act did not make it mandatory for the respondent to give reasons for its decision. Hence, the applicant appealed. The issues that arose were (i) whether the applicant had satisfied the requirements of ss. 190 and 191 of the GST Act in order to be entitled to the special refund; and (ii) whether the respondent had a legal duty to give reasons for its decision to reject the applicant's special refund application.

Held (allowing appeal with costs)
Per Badariah Sahamid JCA delivering the judgment of the court:

(1) The applicant's refund application was made on 26 August 2015, within six months of 1 April 2015 as required under s. 191(1) of the GST Act. Pursuant to s. 191(2) of the GST Act, there was an independent declaration by auditor E & Y which had confirmed the accuracy of the applicant's refund application, including stock on hand on the effective date of 1 April 2015. There was no challenge to the accuracy of the audit certificate. Thus, for the purposes of compliance with the GST Act, there was no inaccuracy in the statement of the goods held on hand on the effective date of 1 April 2015. (para 47)

(2) The verification physical audit conducted by the respondent was in October 2015, almost six months later, thus the goods held on hand by the applicant in its refund claim on the effective date of 1 April 2015 would not be the same amount of goods held on hand at the applicant's premise six months later on the date of the physical verification audit by the respondent due to the subsequent movement of the goods in the

ordinary course of the applicant's retail business. Further, the GST Act stipulates the effective date of the Act to be 1 April 2015. There are no express provisions for other effective dates other than 1 April 2015. In this case, the physical verification audits had been concluded at five of the applicant's locations between 19 October 2015 and 18 November 2015. If it is the intention of Parliament that the effective date in respect of goods held on hand would be the date of physical audit verification by the respondent, the GST Act would have expressly stated so. This view was reinforced by a requirement in s. 191(2) of the GST Act 'for an audit certificate signed by an approved company auditor under s. 8 of the Companies Act 1965 certifying the amount of the special refund.' In compliance, the applicant had furnished an independent declaration by auditor E & Y which had confirmed the accuracy of the applicant's refund application, including stock on hand on the effective date of 1 April 2015. There was no challenge to the accuracy of the audit certificate. (paras 48 & 49)

(3) The absence of specific provisions in the GST Act which requires the Director General of Customs and Excise ('Director General') to give reasons for its decisions cannot be interpreted to mean that no reasons need be given. If no reasons are needed to be given by the Director General, the GST Act must expressly state so. There is no such express provision in the GST Act which exempts the Director General from having to give reasons for its decision. A duty by the Director General to give reasons for its decision may be implied in the particular circumstances, as the decision was not straight forward but was dependent on many factors which included compliance with the legal requirements under the GST Act, as well as an audit certification of physical stock on hand by an approved auditor. In addition, the crucial need for the submission of accurate data by the applicant of the special refund as mandated by s. 191(3) of the GST Act placed an onerous burden on the applicant to comply with the requirements of the GST Act and by necessary implication, a corresponding duty on the Director General to give reasons for its decision to reject the applicant's refund application. As a public decision-making body, the Director General has a duty to give reasons for its decision. (paras 59 & 60)

Case(s) referred to:

Doody v. Secretary of State for the Home Department and Other Appeals [1993] 3 All ER 92 ***(refd)***

Dover District Council v. CPRE Kent [2017] UKSC 79 ***(refd)***

Ikano Pte Ltd v. Ketua Pengarah Kastam dan Eksais (Application for judicial review no: WA-25-3602-2017) (Unreported) ***(refd)***

Kelab Lumba Kuda Perak v. Menteri Sumber Manusia, Malaysia & Anor [2005] 3 CLJ 517 CA ***(refd)***

Kesatuan Pekerja-pekerja Bukan Eksekutif Maybank Bhd v. Kesatuan Kebangsaan Pekerja-pekerja Bank & Anor [2017] 4 CLJ 265 FC ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***
Minister of Labour, Malaysia v. Chan Meng Yuen [1992] 4 CLJ 1808; [1992] 1 CLJ (Rep) 216 SC ***(refd)***
Pembinaan Batu Jaya Sdn Bhd v. Pengarah Tanah dan Galian, Selangor & Anor [2016] 5 CLJ 250 CA ***(refd)***
Pendaftar Pertubuhan v. Datuk Justine Jinggut [2013] 2 CLJ 362 FC ***(refd)***
R (Burridge) v. Breckland [2013] EWCA Civ 228 ***(refd)***
Rohana Ariffin & Anor v. Universiti Sains Malaysia [1989] 1 MLJ 487 HC ***(refd)***
William Keith Abbot v. Coroners Court of New Plymouth Civ - 2004-443-660 ***(refd)***

Legislation referred to:
Companies Act 1965 (repealed), s. 8
Goods and Services Tax Act 2014 (repealed), ss. 190(1)(a), (b), (c), (d), 191(1), (2)(b), (3), 20, 185
Rules of Court 2012, O. 53 r. 3(1)
Societies Act 1966, s. 16(1), (2)
Trade Unions Act 1959, s. 12(2)

For the appellant - Mohd Arief Emran Arifin & Kellie Yap; M/s Wong & Partners
For the respondent - Farah Ezlin Yusop Khan & Syamimi Farhana Muhammad A Aziz; SFCs

[Editor's note: Appeal from High Court, Kuala Lumpur; Judicial Review No: WA-25-35-02-2017 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Badariah Sahamid JCA:

Introduction

[1] This is an appeal by the applicant in the High Court, Uniqlo (Malaysia) Sdn Bhd against the decision of the learned High Court Judge, Datuk Hajjah Azizah bt Hj Nawawi, who dismissed with costs the applicant's application for judicial review.

[2] The applicant's application for judicial review pursuant to O. 53 r. 3(1) of the Rules of Court 2012 ('ROC 2012') had sought the following orders:

(i) An order of *certiorari* to quash the respondent's decision dated 16 November 2016 that the applicant's application for special refund of sales tax for goods held on hand pursuant to s. 190 of the Goods and Services Tax Act 2014 ('GST Act') is rejected without any justification or reasoning; and

A (ii) An order of *mandamus* directing that the respondent refund the sum of RM6,076,369.33 for the special refund of sales tax for goods held on hand to be paid to the applicant by the respondent upon final determination of this judicial review.

Background Facts

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[3] The narration of the background facts is derived from the learned High Court Judge's ('learned judge') "grounds of decision", with suitable modifications.

[4] For ease of reference, parties will be referred to as they were in C proceedings before the High Court.

[5] The applicant, Uniqlo (Malaysia) Sdn Bhd is a company in the retail business whereby it imports garments, under the Uniqlo brand name, from China, Vietnam, Indonesia, Bangladesh etc for sale to Malaysian customers. The applicant retails its goods through its 37 outlets in various locations D within Malaysia.

[6] Pursuant to the introduction of GST regime, the applicant was registered under s. 20 of the GST Act effective from 1 April 2015.

[7] Subsequently, on 26 August 2015, the applicant submitted an E application to the respondent for a special refund of sales tax for goods held in hand by the applicant pursuant to s. 191 of the GST Act ('special refund application').

[8] As required under s. 191(2) of the GST Act, the applicant had also submitted a copy of an audit certificate signed by an independent auditor, F Messrs Ernst & Young, ('E & Y'), certifying the amount of special refund claimed under the special refund application.

[9] By a letter dated 2 September 2015, the respondent requested from the applicant relevant supporting documents to be submitted for the purposes of a sales tax audit to be conducted by the respondent. On the same date, the G respondent also issued audit notices to require access to the applicant's premises. The applicant fully co-operated and duly complied with all the respondent's request for access and for further information. Consequently, an audit was conducted by the respondent at the applicant's premises on 10 September 2015.

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[10] Following the audit, the respondent requested for a meeting with the applicant on 17 September 2015 to discuss matters relating to the special refund application. On 23 September 2015, the applicant received an e-mail from the respondent requesting for further supporting documents relating to 100 sampling stock units for the respondent's review. This request was I complied with by the applicant on 15 October 2015. Thereafter, the

respondent also requested for the applicant to provide the respondent with the applicant's stock location list. This list was provided by the applicant *vide* e-mail to the respondent on 12 October 2015.

[11] In addition to the above, the respondent also requested for visits to the applicant's stock locations. In compliance with the said request, access was provided and stock takes were conducted at the applicant's relevant locations between 19 October 2015 and 28 October 2015.

[12] On 22 October 2015 and 29 October 2015, the applicant received a further request for the details on stock movement for a total of 16 product items for each of the selected Uniqlo stores as well as a further meeting with the respondent to discuss the derivation of the stock movement data. This was complied with by the applicant on 17 November 2015. In addition, the respondent had requested to conduct further audits at a few of the applicant's outlets and this request was duly complied with by the applicant on 18 November 2015.

[13] During the said last mentioned audit, the respondent requested for the applicant's price list before and after the implementation of GST. This list was provided by the applicant to the respondent on 21 November 2015.

[14] *Vide* a letter dated 16 November 2016, the respondent issued a letter to the applicant informing the applicant of the decision that the applicant's special refund application had been rejected. The letter reads as follows:

> Di maklumkan, permohonan tuan Di TOLAK kerana melalui semakan mendapati:
>
> - Keputusan Ketua Pengarah.

[15] In response, the applicant wrote a letter to the respondent dated 15 December 2016, requesting for clarification and/or reasons for the rejection.

[16] Aggrieved by the respondent's decision and absence of response to the applicant's request for clarification and/or reasons for rejection, the applicant filed the instant judicial review application to challenge the respondent's decision to reject the applicant's special refund application.

Submissions Of Parties

[17] The arguments forwarded by parties before the High Court may be summarised below.

Applicant's Submissions

[18] The applicant has fulfilled all the requirements of ss. 190(1) and 191(2)(b) of the GST Act to be granted the special refund in that:

A (i) the applicant is a registered person under s. 20 of the GST Act as at 1 April 2015 (the effective date under the GST Act);

(ii) the applicant had submitted the special refund application within six months of the effective date of 1 April 2015 as required under s. 191(1) of the GST Act;

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(iii) pursuant to s. 191(2)(b) of the GST Act, the applicant had obtained a signed copy of an audit certificate by an approved company auditor (E & Y) certifying the amount of special refund;

(iv) the goods of the applicant are taxable under the Sales Tax Act 1972 and
C the sales tax has been charged to and paid by the applicant;

(v) the applicant held the relevant import documents to prove that the applicant is the importer, consignee or owner of goods for which sales tax has been paid.

D **[19]** Despite the applicant's full compliance with the abovementioned requirements as well as other requests of the respondent, the applicant's special refund application was rejected by the respondent without giving any reasons for the said rejection.

[20] There were no discrepancies in the goods held by the applicant on the
E effective date. The discrepancies arose due to the respondent's conduct of a verification audit on the applicant's premises in October 2015, almost six months after the effective date of 1 April 2015. In the interim period of about six months, any discrepancies were unavoidable as the goods would have been sold or relocated in the normal course of retail business of the
F applicant.

[21] The respondent had failed to give reasons for its rejection of the applicant's special refund application in its letter of 16 November 2016. There is a general duty to provide reasons when the matters are contentious and involves the discretionary powers of the Government or other statutory
G bodies. Thus, the respondent's decision to reject the applicant's special refund application is infirmed by illegality, irrationality and procedural impropriety.

Respondent's Submissions

H **[22]** The applicant had explained to the respondent that the calculation of available goods held for the purpose of the special refund was done through the applicant's system and not calculated physically. The respondent made arrangements with applicant and conducted physical verification audits in respect of the goods held by the applicant in five outlets owned by the applicant as follows:

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(i) Uniqlo Fahrenheit, Bukit Bintang;

(ii) Uniqlo KLCC;

(iii) Uniqlo KLIA;

(iv) Uniqlo Alamanda Putrajaya; and

(v) Uniqlo IOI City Mall Putrajaya.

[23] On completion of the physical verification audits, the respondent made the finding that the goods held in the applicant's system did not correspond with the goods physically held by the applicant. The physical audit was done on 16 selected samples of goods available in the premises owned by the applicant. The physical audit conducted together with the applicant's representatives showed that only three samples in the applicant's system correspond to the physical number of the goods held in the applicant's premises. There were eight other samples in the applicant's system, which upon physical checking of available stock held, could not be verified.

[24] Pursuant to s. 185 of Goods and Services Tax Act 2014 (Act 762) no sales tax is chargeable on taxable goods after Act 762 comes into effect. The applicant was unable to prove that the sales tax element had been removed from the sales price before applying for special refund from the respondent.

[25] On 16 November 2016, the respondent rejected the applicant's claim for special refund for the following reasons:

(i) the applicant had failed to show that on 1 April 2015 (effective date of Act) goods for the purposes of making a taxable supply were held in hand and therefore the condition under sub-s. 185 of Act 762 was not met;

(ii) the applicant had claimed special refund for 3765 stock keeping unit (SKU) of goods, and provided supporting documents of such goods said to be held in hand, but upon physical auditing was found not to be the case. Thus, the applicant had provided inaccurate information to the respondent.

(iii) the applicant has failed to show that the sales tax element has been removed from the goods' selling price before claiming for a special refund from the respondent, hence double taxation imposed.

Findings And Decision Of The High Court

[26] The learned judge's reasons for dismissing the applicant's judicial review application are primarily on the grounds below:

Inaccurate Information under s. 190(3) of GST Act.

[27] The applicant was caught by s. 191(3) of the GST Act which provides that the applicant shall not be entitled to a special refund and the respondent may reject such claim for refund where any information on the claim is found to be false, inaccurate, misleading or misrepresented. The inaccuracies were discovered by the respondent after conducting physical audits of the applicant's goods at five locations of the applicant. In para. 23, the learned judge had stated as follows:

> With regards to inaccurate information, after the physical checking and audit in all the five (5) premises of the applicant, the respondent made a finding that the stock or goods held in the applicant's system does not correspond with the stocks or goods physically held by the applicant. From the physical auditing done by the respondent together with the applicant's representative, the stock or goods listed in the applicant's system does not match with the actual number of goods held in hand by the applicant ...

[28] In response to the applicant's arguments that its auditor, E&Y had already confirmed the accuracy of the applicant's refund application on the effective date 1 April 2015, including the accuracy of the stock on hand on the same date, and that the discrepancy was unavoidable because the physical verification audit was only conducted in October 2015 when the goods would have been sold or moved to different locations, the finding of the learned judge are as follows:

> However, on this issue, I agree with the respondent that the list for auditing and the related sampling was given by the applicant. The physical checking was done together with the representatives of the applicant. As the applicant has custody and control over its documents and its stocks in hand, the applicant bears the burden to ensure that the samplings that they gave for the purpose of the audit are accurate.

No Requirement To Give Reasons Under Section 191 Of GST Act

[29] The learned judge acknowledged that no reasons were given for the rejection of the applicant's refund application by the respondent in its letter dated 16 November 2016.

[30] Notwithstanding the above, the learned judge was of the view that s. 191 of the GST Act does not make it mandatory for the respondent to give reasons for its decision. In support of the position taken by the learned judge that where an Act of Parliament does not expressly provide a duty to give reasons, no such duty arises, reference was made to the Federal Court cases of *Pendaftar Pertubuhan v. Datuk Justine Jinggut* [2013] 2 CLJ 362; [2013] 3 MLJ 16; *Minister of Labour, Malaysia v. Chan Meng Yuen* [1992] 4 CLJ 1808; [1992] 1 CLJ (Rep) 216; [1992] 2 MLJ 337).

[31] In addition, the learned judge had taken into account the fact that subsequently on 17 February 2017, after the filing of the judicial review application, the applicant had received an undated letter from the respondent which gave reasons for the rejection of the applicant's refund application as follows:

(i) the applicant did not remove the sales tax element in the selling price for the stock in hand as at 1 April 2015; and

(ii) the information provided by the applicant is inaccurate, therefore the respondent's decision is in accordance with s. 191(3) of the GST Act.

[32] Thus, the learned judge had concluded as follows:

> In the present case, the respondent had issued another letter to the applicant, *albeit* after the filing of this application, where he explained the reasons for the Decision. Therefore, bearing in mind that there is no statutory duty imposed on the respondent to provide reasons for his Decision, I am not minded to quash the Decision merely on the basis that the respondent did not provide any reasons for his decision in the first letter.

Grounds Of Appeal

[33] The applicant's grounds of appeal before us may be summarised as follows.

[34] The failure of the respondent to give reasons for its decision in its letter of 16 November 2016. There is a general duty to provide reasons when the matters are contentious and involves the discretionary powers of public decision-making bodies. (*Kesatuan Pekerja-pekerja Bukan Eksekutif Maybank Bhd v. Kesatuan Kebangsaan Pekerja-pekerja Bank & Anor* [2017] 4 CLJ 265).

[35] Such a duty need not be expressly provided in statutes and can be implied from the particular facts and circumstances of the case. (*Kesatuan Pekerja-pekerja Bukan Eksekutif Maybank Bhd v. Kesatuan Kebangsaan Pekerja-Pekerja Bank* [2017] 4 CLJ 265; *Doody v. Secretary of State for the Home Department and Other Appeals* [1993] 3 All ER 92; *Dover District Council (Appellant) v. CPRE Kent (Respondent)* [2017] UKSC 79; *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65).

[36] The learned judge had erred in taking into account the reasons provided by the respondent in a letter dated 17 February 2017 to the applicant after the applicant had filed the instant judicial review application against the respondent. (*R (Burridge) v. Breckland* [2013] EWCA Civ 228; *William Keith Abbot v. Coroners Court of New Plymouth Civ* - 2004-443-660; *Ikano Pte Ltd v Ketua Pengarah Kastam dan Eksais* (Application for judicial review no: WA-25-3602/2017)).

[37] In addition, the applicant contends that the learned judge had erred in her finding that the applicant had failed to fulfil the requirements of s. 191 of GST Act in its failure to provide accurate information in respect of the refund application. The refund application was made on 26 August 2015, within six months of 1 April 2015 as required under s. 191(1) of GST Act. Pursuant to s. 191(2) of the GST Act, there was an independent declaration by auditor E & Y which had confirmed the accuracy of the applicant's refund application, including stock in hand on the effective date of 1 April 2015.

[38] The verification audit conducted by the respondent was in October 2015, more than six months after the effective date on 1 April 15. Thus, discrepancies on the stocks in hand were unavoidable because in the interim period of six months the items would have been sold or relocated to different stores or have been moved to other areas in store eg, changing rooms, in the course of business.

[39] In short, the learned judge had erred in taking into consideration the applicant's stock on the date of verification audit in October 2015, instead of the effective date of 1 April 2015, almost six months earlier.

Our Decision

[40] After careful consideration of learned counsel's oral and written submissions, the appeal records and relevant precedents, we were of the unanimous view that there were merits in this appeal that warrant appellate intervention. We therefore allow the appeal with costs and set aside the decision of the learned judge. The grounds of our decision are stated below.

[41] In our considered view, the appeal before us revolves around two primary issues: One, whether the applicant has satisfied the requirements of ss. 190 and 191 of the GST Act in order to be entitled to the special refund? Two, whether the respondent has a legal duty to give reasons for its decision to reject the applicant's special refund application? We will deal with each issue forthwith.

Requirements Of Sections 190 And 191 Of GST Act

[42] Section 190 of the GST Act stipulates that the entitlement for a special refund of sales tax is subject to the following requirements:

> **190. Special refund of sales tax for goods held on hand**
>
> (1) A person is entitled to a special refund equal to the amount of sales tax in respect of the goods held on hand subject to the following conditions:
>
> (a) the claimant is a registered person under s. 20 as at the effective date;
>
> (b) the claimant on the effective date holds goods for the purposes of making a taxable supply;

(c) the goods are taxable under the Sales Tax Act 1972 and the sales tax has been charged to and paid by the claimant; and

(d) the claimant must hold the relevant supplier's invoice proving that the claimant is the recipient for which sales tax has been charged or import documents proving that the claimant is the importer, consignee or owner for which sales tax has been paid.

(2) In the case where:

(a) The goods are purchased from suppliers other than a licensed manufacturer;

(b) The goods are taxable under the Sales Tax Act 1972; and

(c) The invoice held by the person for the good purchased does not show that the sales tax has been charged,

he is entitled to a special refund equal to twenty per cent of the value of the goods he holds on the effective date as ascertained from the invoice multiplied by the applicable sales tax rate subject to the following conditions:

(A) the claimant is a registered person under s. 20 as at the effective date;

(B) the claimant on the effective date holds goods for the purposes of making a taxable supply; and

(C) the claimant has paid the amount as shown on the invoice.

(3) Where a claim for special refund has been made under sub-s. (1) or (2) and subsequently the claimant returns the goods to the supplier, the claimant shall account the amount of special refund as his output tax in the return for the taxable period in which the goods are returned.

(4) The special refund shall not apply to:

(a) goods which have been capitalised under accepted accounting principles;

(b) goods which have been used partially or incorporated into some other goods;

(c) goods held for hire, goods held for other than business use and goods not for sale or exchange;

(d) goods on which sales tax has been paid under the Sales Tax Act 1972 before the effective date and subsequently to be exported on or after the effective date where a claim for drawback on the sales tax paid is to be made under s. 29 of the same Act; or

(e) goods on which the claimant is allowed to claim for a deduction of sales tax under s. 31A of the Sales Tax Act 1972.

191. Claim for special refund

(1) Any person who is entitled to a special refund under s. 190 shall be eligible to claim once and such claim shall be made to the officer of goods and services tax in a form as the Director General may determine not later than six months from the effective date.

(2) Where the amount of special refund under sub-s. (1) is:

(a) less than ten thousand ringgit, the claimant shall furnish to the officer of goods and services tax an audit certificate signed by a chartered accountant certifying the amount of special refund; or

(b) ten thousand ringgit or more, the claimant shall furnish to the officer of goods and services tax an audit certificate signed by an approved company auditor under s. 8 of the Companies Act 1965 certifying the amount of the special refund.

(3) Where any information on the claim provided by the claimant is found to be false, inaccurate, misleading or misrepresented:

(a) he shall not be entitled to a special refund and the officer of goods and services tax may refuse such claim; or

(b) he shall be taken not to have been entitled to a special refund and it shall be lawful for the Director General to recover any refund which has been paid to the claimant.

(4) Subject to sub-s. (3), the special refund shall be refunded quarterly in equal instalments over a period of two years or any shorter period as the Director General may determine.

(5) Where a claim has been made under sub-s. (1), the goods shall be deemed to have been given credit for input tax and all provisions of this Act shall apply accordingly.

[43] It is the applicant's contention that the applicant had satisfied the requirements of ss. 190 and 191 of the GST Act to be entitled to the special refund. Pursuant to s. 190(1)(a), (b), (c) and (d) of the GST Act, the applicant was registered under the GST Act on the effective date; and the goods were held in hand by the applicant on the effective date. In addition, the goods are taxable under the Sales Tax Act 1972 and the sales tax has been charged to and paid by the applicant. In addition, pursuant to s. 191(1) of the GST Act, the claim for special refund was made to the respondent within six months of the effective date. In compliance with s. 191(2)(b) of the GST Act, the applicant had submitted to the respondent, an audit certificate signed by an approved company auditor, E & Y, under s. 8 of the Companies Act 1965 certifying the amount of the special refund.

[44] The crux of the respondent's argument is that applicant is not entitled to claim the special refund because of the requirement of s. 191(3) of the GST Act which provides that where any information on the claim provided by the applicant is found to be false, inaccurate, misleading or misrepresented, the applicant is not entitled to the special refund.

[45] According to the respondent, there were inaccuracies between the statement of goods held on hand as stated in the applicant's claim for special refund and the actual goods held in hand by the applicant, which inaccuracies were discovered by the respondent after conducting physical audits of the applicant's goods at five locations of the applicant. The applicant asserts that there was no such inaccuracy as on the effective date, the goods held in hand had been certified by an approved auditor E&Y, and the accuracy of the audit certification has not been challenged by the respondent.

[46] From the above, it appears that there is a difference of interpretation as to when is the effective date to determine the accuracy of the declaration by the applicant that the goods are held in hand.

[47] In our considered view, we are minded to favour the interpretation of the applicant for the following reasons. The applicant's refund application was made on 26 August 2015, within six months of 1 April 2015 as required under s. 191(1) of GST Act. Pursuant to s. 191(2) of the GST Act, there was an independent declaration by auditor E & Y which had confirmed the accuracy of the applicant's refund application, including stock in hand on the effective date of 1 April 2015. There was no challenge to the accuracy of the audit certificate. Thus, for the purposes of compliance with the GST Act, there was no inaccuracy in the statement of the goods held in hand on the effective date of 1 April 2015.

[48] The verification physical audit conducted by the respondent was in October 2015, almost six months later. It stands to reason that the goods held on hand by the applicant in its refund claim on the effective date of 1 April 2015 would not be the same amount of goods held on hand at the applicant's premises six months later on the date of the physical verification audit by the respondent due to the subsequent movement of the goods in the ordinary course of the applicant's retail business. It would be unusual if it were otherwise, unless the applicant's business had stagnated which has not been shown to be the case.

[49] We disagree with the contention of the respondent that the effective date is the date of the physical audit verification conducted by the respondent in October 2015 for the following reasons. It is not disputed that the GST Act stipulates the effective date of the Act to be 1 April 2015. There are no express provisions for other effective dates other than 1 April 2015. There must be certainty in respect of what is meant by "the effective date". If we

were to accept the contention of the respondent, the "effective date" would then be any/all the dates on which the respondent conducts its physical verification audit at the applicant's premises. In this case, the physical verification audits had been conducted at five of the applicant's locations between 19 October 2015 and 18 November 2015. The GST Act had stated the effective date of the Act to be 1 April 2015. If it was the intention of Parliament that effective date in respect of goods held on hand would be the date of physical audit verification by the respondent, the GST Act would have expressly stated so. Our view is reinforced by a requirement in s. 191(2) of the GST Act, "for an audit certificate signed by an approved company auditor under s. 8 of the Companies Act 1965 certifying the amount of the special refund". In compliance, the applicant had furnished an independent declaration by auditor E & Y which had confirmed the accuracy of the applicant's refund application, including stock in hand on the effective date of 1 April 2015. There was no challenge to the accuracy of the audit certificate.

[50] Thus, we are of the view that the learned judge had erred in her finding that the effective date for purposes of ss. 191 and 192 of the GST Act is the date of the physical audit verifications by the respondent and not 1 April 2015 as prescribed in the GST Act.

The Duty To Give Reasons For Decision

[51] There is no dispute that in the respondent's letter to the applicant dated 16 November 2016 which conveyed the respondent's decision to reject the applicant's claim for special refund under s. 190 of the GST Act, no reasons were given for the rejection. The letter reads as follows:

> Di maklumkan, permohonan tuan Di TOLAK kerana melalui semakan mendapati:
>
> - Keputusan Ketua Pengarah.

[52] The GST Act does not expressly provide that the respondent is required to give reasons for its decision to accept or reject any application for special refund. Be that as it may, is there a duty on the respondent to give reasons for its decision? Does the absence of such reasons constitute a breach of procedural fairness on the part of the respondent?

[53] In support of the position that where an Act of Parliament does not expressly provide a duty to give reasons, no such duty arises, learned counsel for the respondent had referred to the Federal Court cases of *Pendaftar Pertubuhan v. Datuk Justine Jinggut* [2013] 2 CLJ 362; [2013] 3 MLJ 16; *Minister of Labour, Malaysia v. Chan Meng Yuen* [1992] 4 CLJ 1808; [1992] 1 CLJ (Rep) 216; [1992] 2 MLJ 337).

[54] In our view, the two cases abovementioned can be distinguished from the instant case. The case of *Justin Jinggut* (*supra*) can be distinguished on its particular facts. One of the issues raised before the Federal Court was whether the Registrar of Societies ('ROS') was required to give reasons if he decided to de-register a society for failure to comply with s. 16(1) of the Societies Act 1966. The brief facts were that a leadership crisis had occurred within SNAP ('Parti Kebangsaan Sarawak') between two groups. The ROS had issued a notice under s. 16(1) of the Societies Act informing SNAP that he was of the opinion that a dispute had occurred among the office bearers of SNAP, as a result of which the ROS was not satisfied as to the identities of the persons who had been properly constituted as the office bearers of SNAP. Hence, SNAP was asked to produce evidence of a settlement of the dispute and of a proper appointment of the lawful office bearers of SNAP or of the institution of proceedings towards the settlement of the dispute. The notice dated 2 July 2002 sent to the Secretary General of SNAP states that the party is to take steps to settle the dispute within one month. Section 16(2) of the Act states that:

> 16(2). If any such notice as is provided in sub-s. (1) is not complied with to the satisfaction of the Registrar within the period of one month or any extension thereof allowed by the Registrar, the Registrar may take steps to cancel the registration of the society under section 13.

[55] The Federal Court in *Justine Jinggut* (*supra*) (Abdull Hamid Embong FCJ, delivering the judgment of the court) had examined the specific powers of the ROC under the Societies Act, and stated as follows: (at para. 29)

> ... This appeal involves the statutory interpretation of s.16 of the Act and s.13 of the Act. On a literal interpretation of s. 16(1) of the Act we are of the view that the ROS is not empowered to inquire into the validity of those meetings referred to in order to form an opinion regarding the existence of a dispute. The ROS merely needs to act on the documents presented to him to objectively decide if a dispute had arisen. Once he is satisfied, and here we say on a subjective test, that a dispute had in fact occurred, he may straight away from such an opinion. We say that this is his only statutory duty. The word 'opinion' as found in s. 16(1) entails a subjective evaluation by the ROS. It is defined in the Concise Oxford Dictionary as 'according to one's view or belief'. He forms this opinion based on the documents and information before him.

[56] Thus, it is clear that the decision of the Federal Court in *Justin Jinggut* (*supra*) that the courts will not question the discretionary decision of the ROS is premised on the specific powers of the ROS. In paras 51 and 52 it was stated as follows:

> [51] The only basis for cancellation of a society's registration under s. 13 is for non-compliance of a s. 16(1) notice. As earlier stated, and we repeat for emphasis, once the ROS is satisfied on this failure to comply, he may, accordingly act, to de-register a society.

A [52] The decision to de-register SNAP is merely consequential to the failure of SNAP to comply. Once the conditions stated in the s. 16(1) notice have not been satisfied, the operation of s. 13 is triggered. No reasons are required under the law; no reasons need to be given.

[57] Thus, the decision in the *Justine Jinggut* (*supra*) that no reasons need B to be given by the ROS must be examined within the confines of the Societies Act and the powers of the ROS. It certainly cannot be taken as authority for a general proposition that no reasons are required to be given by a public authority in the exercise of his discretion. In addition, the case relied on by the respondent, *Minister of Labour, Malaysia v. Chan Meng Yuen* [1992] 4 CLJ C 1808; [1992] 1 CLJ (Rep) 216; [1992] 2 MLJ 337), does not reflect the current prevailing view on the duty to give reasons in appropriate circumstances as demonstrated in the more recent cases referred to below.

[58] We are of the considered view that on the facts and circumstances of this case, the respondent has a duty to give reasons for its decision. We find D support for the above view in the following authorities. In the recent Federal Court case of *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v. Kesatuan Kebangsaan Pekerja-pekerja Bank* [2017] 4 CLJ 265; [2018] 2 MLJ 590, ('*Kesatuan Pekerja-Pekerja*') one of the issues raised was whether in exercise of his powers under s. 12(2) of the Trade Unions Act 1959, the E failure of the Director General of Trade Unions ('DG'), to give any reasons for any decision made under the guise of exercising his absolute discretion offends the principle of natural justice. Balia Yusoff Wahi JCA (as he then was) delivering the judgment of the Federal Court had stated as follows:

F [86] It is also settled public law principle and principle of natural justice that a public decision-making body is under a duty to give reasons for its decision. Indeed, a reasoned decision can be an additional constituent of the concept of fairness. (*Rohana bt. Ariffin & Anor v. Universiti Sains Malaysia* [1989] 1 MLJ 487 and *Kelab Lumba Kuda Perak v. Menteri Sumber Manusia, Malaysia & Ors* [2005] 5 MLJ 193). The giving of reason is also one of the fundamentals of good administration.

G [87] The absence of any provisions in the statute requiring the decision maker to give reasons ought not to be understood or taken to mean that there is no such duty to give reasons unless that very statute specifies that no reasons needs be given. The absence of such a provision ought not to be regarded as a cloak under which the decision maker can hide his H rationale for making the decision, privy only to himself but a mystery to the interested parties or the public at large.

[88] In a case where the decision is one that is straight forward and one that is not mired in circumstances that would invite further or deeper rationalisation, then perhaps the need to give reasons by the decision maker may not arise. The circumstances arising in the particular case may I by implication, demand the imposition of a duty to give reasons. Lord Mustill in the House of Lords case of *Doody v. Secretary of State for the Home Department And Other Appeals* [1993] 3 All ER 92 said:

> I accept without hesitation … that the law does not at present recognise a general duty to give reasons for an administrative decision. **Nevertheless, it is equally beyond question that such a duty may in appropriate circumstances be implied.** (emphasis added)

[59] From the most recent pronouncement of the Federal Court in the *Kesatuan Pekerja-Pekerja* case (*supra*) abovementioned and the House of Lords case of *Doody v. Secretary Of State For The Home Department And Other Appeals* [1993] 3 All ER 92, as well as other authorities referred to by the Federal Court in *Kesatuan Pekerja-Pekerja* (*supra*) the legal position in respect of the duty to give reasons as applied to the facts of the instant case can be summarised as follows. One, the absence of specific provisions in the GST Act which requires the Director General to give reasons for its decision cannot be interpreted to mean that no reasons need be given. Two, if no reasons need to be given by the Director General, the GST Act must expressly state so. In the instant case, there is no such express provision in the GST Act which exempts the Director General from having to give reasons for its decision. Three, a duty by the Director General to give reasons for its decision may be implied in the particular circumstances, as the decision is not straight forward but is dependent on many factors which include compliance with the legal requirements under the GST Act, as well as an audit certification of physical stock in hand by an approved auditor. In addition, the crucial need for the submission of accurate data by the applicant of the special refund as mandated by s. 191(3) of the GST Act places an onerous burden on the applicant to comply with the requirements of the GST Act and by necessary implication, a corresponding duty on the Director General to give reasons for its decision to reject the applicant's refund application.

[60] In addition, as a public decision-making body, the Director General of Customs and Excise, (the respondent) has a duty to give reasons for its decision. As stated by the Federal Court in the *Kesatuan Pekerja-Pekerja* case (*supra*), a reasoned decision can be an additional constituent of the concept of fairness. (*Rohana Ariffin v. Universiti Sains Malaysia & Another Case* [1989] 1 MLJ 487 and *Kelab Lumba Kuda Perak v. Menteri Sumber Manusia, Malaysia & Anor* [2005] 3 CLJ 517; [2005] 5 MLJ 193). The giving of reasons is also one of the fundamentals of good administration, as it inculcates transparency and accountability in public decision-making bodies like the Director General of Customs and Excise.

[61] The duty to give reasons by public decision-makers was also endorsed by the Court of Appeal in the recent case of *Pembinaan Batu Jaya Sdn Bhd. v. Pengarah Tanah dan Galian, Selangor & Anor* [2016] 5 CLJ 250, where the appellant had sought to review the State Authority's decision in relation to the alienation of land. One of the contentions raised on appeal was that the

decision to revoke the initial approval to alienate land to the appellant was bad as it was unreasonable in that no reasons were given for the revocation. Abang Iskandar JCA (as he then was) delivering the judgment of the court had stated as follows:

> [45] … the principle as stipulated in the *Sri Lempah Enterprise* case (*supra*) is applicable in cases involving exercise of discretion, absolute or otherwise. High authorities have shown such phrase to be a gross anomaly that cannot pretend to even co-exist. (See for instance: *Pyx Granite Co. Ltd v. Ministry of Housing and Local Government* [1958] 1 All ER 625). In exercise of a public power, there is no escaping the obligation on the part of the decision-maker to act reasonably in the peculiar circumstances of the case that appears before him. One of the fundamental features of modern administrative law jurisprudence has been the growing need for the public decision maker to give reasons for his decision. It may be inconvenient to do so. But it is an indivisible component in all decision-making processes. We find that every decision, both good and bad is driven to such conclusion by a reason. Learned Justice Zainun Ali JCA (as she then was) in the case of *Datuk Justin Jinggut v. Pendaftar Pertubuhan* [2012] 1 CLJ 825; [2012] 3 MLJ 212 had said this:
>
> > Thus, if no reason is given by the respondent, it is open for this Court to conclude that he had no good reason in as much as it is open for us to conclude that the respondent had not exercised his discretion in accordance with the law.

[62] It must further be said that in the instant case, the duty of the respondent to give reasons for its decision to reject the applicant's refund application must be at the time the decision is conveyed to the applicant by a letter dated 16 November 2016, and not subsequently, where the respondent only provided reasons for its decision in a letter dated 17 February 2017 to the applicant after the applicant had filed the instant judicial review application against the respondent. The reasons given by the respondent were as follows:

(i) the applicant did not remove the sales tax element in the selling price for the stock in hand as at 1 April 2015; and

(ii) the information provided by the applicant is inaccurate, therefore the respondent's decision is in accordance with s. 191(3) of the GST Act.

[63] We agree with the contention of learned counsel for the applicant that the giving of reasons subsequently may be construed as an afterthought and cannot be taken into account. (See *R (Burridge) v. Breckland* [2013] EWCA Civ 228; *William Keith Abbot v. Coroners Court of New Plymouth* Civ-2004-443-660; *Ikano Pte Ltd v. Ketua Pengarah Kastam dan Eksais* (Application for judicial review no: WA-25-3602-2017).

[64] Thus, the learned judge had clearly erred in her finding that there was no duty on the respondent to give reasons for its decision because of the absence of such duty expressly provided in the GST Act and further, in taking into account the reasons given by the respondent subsequent to its decision. The applicant had written to the respondent as to the reasons for the rejection of the refund application, but there was no response from the respondent, until after the filing of the applicant's JR application. The learned judge had clearly erred in taking these reasons into consideration.

Conclusion

[65] We are of the considered view that in the particular circumstances of the case and on the strength of recent authorities, in particular, the Federal Court decision of *Kesatuan Pekerja-Pekerja* (*supra*), there was a duty on the Director General of Customs and Excise (respondent) to give reasons for its rejection of the applicant's special refund claim at the time the decision was conveyed to the applicant by letter dated 16 November 2016. We are persuaded that in not giving reasons for its rejection of the applicant's claim, the respondent had acted unfairly and unreasonably.

[66] In addition, the evidence adduced demonstrate that the applicant had fulfilled the requirements of ss. 190 and 191 of the GST Act to be allowed the special refund. We are inclined to hold that the facts as adduced would not have led any decision-making authority to have come to a decision which the respondent did.

[67] For all the reasons mentioned above, we allow this appeal and set aside the order of the learned High Court Judge. As a consequence, thereof, the applicant's prayers for a *certiorari* and *mandamus* in the High Court is granted. We award costs of RM15,000 to the applicant for here and below subject to allocator.